Supreme Court, U. S.
FILED
JAN 19 1980
MICHAEL RODAK, JR., CLERK

79-1123

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

CLARENCE NEVILLE,
Petitioner

-VS-

C. JOSEPH CAVANAGH, State's Attorney, Sangamon County, Springfield, Illinois, and GEORGE A. RALSTON, Warden, United States Penitentiary, Terre Haute, Indiana,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Court of Appeals No. 79-1188

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Clarence Neville, by his attorney, Carl Ziemba, respectfully prays this Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the case of Clarence Neville, petitioner-appellant vs. C. Joseph Cavanagh, State's Attorney, Sangamon County, Springfield, Illinois, and George A. Ralston, Warden, United States Penitentiary, Terre Haute, Indiana, respondents-appellees, No 79-1188, to review the Opinion filed on December 21, 1979, affirming the judgment of the district court dismissing petitioner's petition for a writ of habeas corpus as prematurely filed.

OPINION BELOW

The Court of Appeals issued an opinion which was filed on December 21, 1979. It remains unpublished at date

hereof. A copy of the opinion is appended hereto as Appendix 'A'.

The district court issued an opinion dismissing petitioner's petition for writ of habeas corpus. At date hereof, the opinion is unpublished; a copy thereof is appended hereto as Appendix 'B'.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals affirming the judgment of the district court was filed on December 21, 1979.

The jurisdiction of this Court is invoked under *28 U.S.C.§ 1254(1).*

STATUTES INVOLVED

28 U.S.C. 2254(a) provides as follows:

> 'The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'

18 U.S.C. Appendix, Article IV(e) provides as follows:

> 'If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e), such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.'

QUESTION PRESENTED

Whether a petition for a writ of habeas corpus in federal district court seeking to prevent trial of petitioner in a state court on the basis that the state court has lost jurisdiction to try the petitioner because of violation of the interstate agreement on detainers is prematurely filed under authority of *Braden* v *30th Judicial Circuit Court of Kentucky,* 410 US 484 (1973) when the highest appellate court of the state after a full appeal decided the question of jurisdiction adversely to petitioner.

STATEMENT OF PERTINENT FACTS

Petitioner entered the federal penitentiary at Terre Haute, Indiana, as a federal prisoner, in 1974 to serve a 10 year sentence.

In June 1976, the State's Attorney of Sangamon County, Illinois, filed a detainer against petitioner under the Interstate Agreement on Detainers based on 28 indictments pending against petitioner in Sangamon County Circuit Court.

Petitioner was transferred to Sangamon County Jail on June 6, 1976. His trial in state court was scheduled for October 25, 1976. One week prior to trial, petitioner's privately retained counsel requested a continuance due to counsel's illness. Petitioner was not in court when the continuance was requested; he was in the county jail. The court granted a continuance until January 1977, with a specific trial date to be selected at a later date. The court also entered an order directing that petitioner be returned to federal custody, and petitioner was transferred back to the federal penitentiary at Terre Haute in October.

The trial court denied this motion. Petitioner then filed a petition with the Illinois Supreme Court seeking permanent prohibition of the trial and dismissal of the indictments with

prejudice on the basis that the trial court had lost all *jurisdiction* to try petitioner on the indictments because of violation of provisions of the Interstate Agreement on Detainers. After a full appeal was granted by the Illinois Supreme Court, that Court filed an opinion on September 20, 1977 ruling against petitioner on the merits of his claim and denying petitioner's petition for a writ of prohibition. The Illinois Supreme Court noted as a historical fact that petitioner was not present in court when the trial court granted his counsel a continuance, but that nonetheless the continuance was sought by petitioner's counsel, that the continuance would result in a lengthy trial delay, that the state had been prepared to go to trial, and that petitioner had not objected to being returned to the federal penitentiary at Terre Haute, and that under the circumstances, the Interstate Agreement on Detainers Act did not require the dismissal of the indictments.

Petitioner's petition for certiorari in the United States Supreme Court was denied.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Illinois, Southern Division, with an application for a temporary restraining order. Both the petition for writ of habeas corpus and application for temporary restraining order were denied.

The district judge in his opinion stated that petitioner's petition for a writ of habeas corpus was premature under the authority of *Braden* v *30th Judicial Circuit Court of Kentucky*, 410 US 484 (1973), that petitioner still had available to him the state trial, appeals if necessary, and then habeas corpus relief in the federal courts.

The United States Court of Appeals for the Seventh Circuit in a 2 to 1 decision affirmed the district court '[i]n light of the fact that [petitioner] does seek to derail a pending state criminal proceeding and that he may be acquitted at trial' and that federal consideration of

petitioner's claim is not barred but merely delayed 'until "a time when federal jurisdiction will not seriously disrupt state judicial processes" '.

REASONS FOR GRANTING THE WRIT

Petitioner's position on the merits is simply that when the State of Illinois sent petitioner back to the federal prison at Terre Haute without having tried petitioner on the Illinois indictments, the State of Illinois lost all *jurisdiction* to try petitioner on the Illinois indictments under *18 USC, Appendix, Article IV(e)* which provides:

> 'If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.'

Petitioner presented this thesis in a pre-trial motion to the Illinois trial court seeking the dismissal of the Illinois indictments. This motion was denied. Petitioner then sought a writ of prohibition in the Illinois Supreme Court, the highest appellate court of the state. After full briefing of the issue by both parties and after full argument and full consideration, the Illinois Supreme Court ruled that the state court had not lost jurisdiction to try petitioner on the Illinois indictments. *Neville* v *Friedman*, 67 Ill2d 488, 367 NE2d 1341 (1977).

Petitioner then sought habeas corpus in the federal district court contending that through its violation of the federal statute, *18 USC, Appendix, Article IV(e)*, the State of Illinois was improperly exercising jurisdiction over petitioner in its attempt to try petitioner on the Illinois indictments.

Petitioner is not seeking to derail a pending state criminal proceeding. Petitioner claims that the state has itself derailed

its prosecution by losing *jurisdiction* to try petitioner because the state has violated a right petitioner has under a federal statute.

Petitioner 'is contesting the very authority of the [state] Government to hale him into court to face trial on the charge against him', *Abney* v *United States*, 431 US 651, (1977).

The controlling fact in *Abney* was that through the operation of the Double Jeopardy Clause of the *5th Amendment* to the United States Constitution the trial court lost all *jurisdiction* to try the defendant. The Court then went on to conclude that the protection accorded by the *5th Amendment* would be of diminished value if the defendant had to wait until he had been tried a second time before he could seek vindication of his *5th Amendment* claim.

In *Harris* v *Washington*, 404 US 55 (1971), the Court held that the Court could exercise its appellate powers where the highest court of the state had decided that the United States Constitution did not deprive the state court of jurisdiction to try the defendant a second time.

In both *Abney* and *Harris* the defendants were not seeking to derail a trial in the trial court; they were seeking vindication of their claims that the trial court was without *jurisdiction* to try them.

Petitioner's position in the case at bar is analogous to that in *Abney* and in *Harris*.

Petitioner maintains that apart from the merits of the state's case in the pending indictment against petitioner in the state court, the state has lost all *jurisdiction* to try petitioner through the operation of a federal statute. Petitioner has accorded the courts of the state full opportunity to recognize petitioner's claim that the state has lost all *jurisdiction* under the federal statute to try petitioner in the state court. The highest state appellate court after full consideration of petitioner's claim has decided that claim adversely to petitioner.

Petitioner has exhausted all of his state remedies. The decision of the Illinois Supreme Court is now the law of the case. All considerations of comity between state and federal judicial systems have been satisfied.

Petitioner has turned to the federal courts for vindication of his rights under the federal statute. Petitioner asks why he must suffer and endure the rigors, the strains, the expenses, the ignominy of public trial in the state court before he is entitled to have his federal claim heard in a federal court when his basic claim is that the state court has no right to try him in the first place because of operation of federal law.

It is respectfully urged that it is important to federal jurisprudence for the Court to extend the fundamental principle of *Abney* and *Harris* to federal habeas corpus proceedings and clearly rule that when a defendant in a state prosecution claims that under operation of a federal statute or the federal Constitution the state court is without jurisdiction to try the defendant and when the defendant has exhausted all state remedies on the issue, the defendant may before trial in the state court apply to the federal courts for habeas corpus relief to vindicate his claim that the state court has no jurisdiction to try him.

CONCLUSION

It is respectfully submitted that for the reasons above given, the Opinion of the Court of Appeals for the Seventh Circuit affirming the judgment of the district court dismissing petitioner's petition for a writ of habeas corpus is in conflict with the decisions of this Court and petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,
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January , 1980

APPENDIX "A"
OPINION OF THE COURT OF APPEALS
(Filed December 21, 1979)

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 79-1188

CLARENCE NEVILLE,
Petitioner-Appellant,

v.

C. JOSEPH CAVANAGH, State's Attorney, Sangamon County, Springfield, Illinois, and
GEORGE A. RALSTON, Warden, United States Penitentiary, Terre Haute, Indiana,
Respondents-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division.
No. 78-C-3127—**J. Waldo Ackerman,** *Judge.*

ARGUED OCTOBER 25, 1979—DECIDED DECEMBER 21, 1979

Before SPRECHER and CUDAHY, *Circuit Judges,* and VAN DUSEN, *Senior Circuit Judge.**

VAN DUSEN, *Senior Circuit Judge.* This is an appeal from a denial by the district court of a petition by Clarence E.

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*The Honorable Francis L. Van Dusen, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

transfer took place in October. Neville did not make a formal objection prior to transfer, but following the transfer he filed a motion to dismiss the charges against him based upon Article IV(e) of the Interstate Agreement. That article provides:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. (Ill.Rev.Stat. 1975, ch. 38, par. 1003-8-9(a).)

The State Circuit Judge denied the motion to dismiss. Neville then obtained leave to file a writ of prohibition in the Illinois Supreme Court but the writ was denied. In an opinion issued on September 12, 1977, the Court held (67 Ill. 2d 488, 495):

> In our judgment nothing in the Agreement on Detainers Act requires the dismissal of charges against a defendant as to whom Illinois was prepared to go to trial, but who was, without objection by him, returned to the sending jurisdiction because of lengthy trial delay occasioned by him. We believe this return under the circumstances implements the underlying rehabilitative purpose of the Act, and that this denial of his subsequent motion to dismiss the indictments was proper.

After the United States Supreme Court denied certiorari on June 19, 1978, the present petition for relief was filed. Neville, pro se, asserts that all available state remedies have been exhausted and that his federally created rights under the Interstate Agreement on Detainer Act, 18 U.S.C. Appendix §§ 1-8, particularly § 2, Article IV(e), have been violated.

Motions to dismiss have been filed by the United States Attorney and Sangamon County State's Attorney. They contend that this Court should not exercise its habeas corpus authority where, as here, there has not been a trial and conviction in the state court proceedings. It is asserted that there are no special circumstances here which could permit aborting a state proceeding by litigating a defense to an indictment prior to trial. *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973). Petitioner responds that he has exhausted his state court remedies. Furthermore, he has filed a motion for injunctive relief to prevent the state officials from transferring him to state court for trial prior to decision on the habeas petition.

The first question before me is whether I should abstain from deciding the habeas petition until the state court proceedings are complete. Following *Braden, supra,* many habeas corpus petitions were filed attempting to adjudicate the merits of affirmative defenses to a state criminal charge, or other unfavorable pretrial rulings, prior to a judgment of conviction by a state court. *See, e.g., Moore v. DeYoung,* 515 F.2d 437 (3rd Cir. 1975); *U.S. ex rel Tyler v. Hall,* 444 F.Supp. 104 (E.D.Mo. 1978); *Malone v. St. of Tennessee,* 432 F.Supp. 5 (E.D.Tenn. 1976); *Raffone v. Stauk,* 425 F.Supp. 345 (D.Conn. 1976). In *Lublin v. Arnold,* 442 F.Supp. 54 (E.D.N.Y. 1977), petitioner sought a writ of habeas corpus based on a violation of the Interstate Agreement on Detainers. The District Court denied the petition on the basis that he was presently appealing the state conviction through the state system.

In *Moore, supra,* at 443, the Court of Appeals for the Third Circuit analyzed the decisions regarding "pre-trial habeas" situations and derived the following principles:

> (1) federal courts have "pre-trial" habeas corpus jurisdiction;

Neville for a writ of habeas corpus. Neville contends that the indictments outstanding against him in the Sangamon County Circuit Court in the State of Illinois should be dismissed because his rights under the Interstate Agreement on Detainers Act, Ill. Rev. Stat. (2) 1975, Ch. 38, § 1003-8-9 (Interstate Agreement),[1] were violated. The district court declined to address the merits of this contention, holding that Neville's petition was premature. Neville also sought injunctive relief prohibiting the State of Illinois from taking custody of him pending the adjudication of his habeas petition. The district court denied this request. We affirm the decision of the district court.

Neville, a federal prisoner, entered the federal penitentiary at Terre Haute, Indiana, in 1974 to serve a 10-year sentence. In June 1976 the State's Attorney of Sangamon County, Illinois, filed a detainer against Neville under the Interstate Agreement, based on 28 indictments pending against Neville in the Sangamon County Circuit Court. Neville was transferred to Sangamon County Jail on June 6, 1976. His trial was scheduled for October 25, 1976. One week prior to trial, Neville's privately retained counsel requested a continuance due to counsel's illness. The court granted a continuance until January 1977, with a specific trial date to be selected at a later time. The court also entered an order directing that Neville be returned to federal custody. Neville was transferred back to the federal penitentiary at Terre Haute in October.

[1] The Interstate Agreement on Detainers Act has been adopted by 44 states, the District of Columbia and the United States. It was enacted to coordinate procedures for handling prisoners in one jurisdiction who faced pending criminal charges in another jurisdiction. According to Article I of the Interstate Agreement, the main purposes of the Agreement are to implement the right to a speedy trial and to minimize the interference with the treatment and rehabilitation of prisoners. In order to further these purposes, the Interstate Agreement creates several new statutory rights.

In January 1977 Neville filed a pre-trial motion to dismiss in Sangamon County Circuit Court, asserting that Article IV(e)[2] of the Interstate Agreement mandated dismissal (3) of his pending indictments. The trial court denied his motion. Neville then filed a petition with the Illinois Supreme Court, seeking permanent prohibition of the trial and dismissal of the indictments with prejudice. In an opinion[3] filed September 20, 1977, the Illinois Supreme Court ruled against Neville on the merits of his claim and denied his petition for a writ of prohibition. Noting that Neville had sought the continuance which resulted in the lengthy trial delay, that the state had been prepared to go to trial, and that Neville had not objected to being returned to Terre Haute, the court held that in these circumstances the Interstate Agreement on Detainers Act does not require dismissal of the charge. Neville sought review in the United States Supreme Court, but certiorari was denied. He then filed a petition for a writ of habeas corpus and an application for a temporary restraining order in the United States District Court for the Southern District of Illinois. The court denied relief on both matters. This appeal followed.

While this appeal was pending, Neville was paroled from the federal penitentiary in Indiana. The State of Illinois had initiated extradition proceedings against Neville and had issued fugitive warrants against him. Neville was transferred to the custody of the sheriff of Vigo County, Indiana, and arraigned on the warrants. He refused to waive extradition.

[2] Article IV(e) provides:

"If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

[3] *Neville v. Friedman*, 67 Ill.2d 488, 367 N.E.2d 1341 (1977).

He was granted bail on the condition that he remain in the State of Indiana.

Although habeas corpus is generally a post-conviction remedy, the federal courts in certain instances have jurisdiction under 28 U.S.C. § 2241(c)(3) (1974)[4] to grant (4) writs of habeas corpus prior to trial to individuals in state custody. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973). Despite the existence of jurisdiction, however, federal courts are reluctant to grant pre-trial habeas relief. In the interests of comity between federal and state courts, the doctrine of exhaustion of state remedies has developed. It applies to pre-trial, as well as post-trial, habeas corpus petitions. *Braden v. 30th Judicial Circuit Court of Kentucky, supra* at 489-92. *See United States ex rel. Parish v. Elrod*, 589 F.2d 327, 329 (7th Cir. 1979); *Moore v. DeYoung*, 515 F.2d 437, 442 (3d Cir. 1975).

In *United States ex rel. Parish v. Elrod, supra*, this court stated that only in "special circumstances" will a habeas

[4] 28 U.S.C. § 2241(c) provides in relevant part:

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . . ."

In determining if the "in custody" requirement has been met, the court examines the status of the petitoner at the time the habeas corpus application was filed. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

In determining if a violation of the laws of the United States has been alleged, the court here is guided by *Echevarria v. Bell*, 579 F.2d 1022 (7th Cir. 1978). In *Echevarria*, a prisoner who had been transferred from federal to state custody and back again without standing trial on the state charges filed a petition for federal habeas corpus relief, alleging his rights under Article IV(e) of the Interstate Agreement on Detainers Act, Ill. Rev. Stat. 1975, ch. 38, § 1003-8-9(a), had been violated. This court found that the petitioner had presented a claim that he was in custody in violation of a law of the United States because "[t]he construction of [an interstate] compact sanctioned by Congress . . . presents a federal question." *Id.* at 1024.

petitioner be able to show that he has exhausted his state remedies prior to trial. 589 F.2d at 329. The court further stated:

> "[T]he possibility that resort in the future to the Illinois appellate courts may be futile does not compel us to disrupt a pending state criminal prosecution at which the petitioner may yet be acquitted."

Id. (citations omitted).

Neville argues that the fact that the Illinois Supreme Court has ruled against him on the merits of his claim constitutes "special circumstances." Thus, he contends (5) that he has satisfied the exhaustion requirement and that the federal court should in this case "adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. at 489.

It is true that here, as in *Braden*, the petitioner has presented his claim to the state courts. Moreover, he has received a ruling on the merits from the Illinois Supreme Court. That holding is, without doubt, the law of the case, and Neville cannot realistically anticipate a different result on this issue at trial or on direct appeal. Nonetheless, we do not believe that on this record the district court was wrong to decline to exercise federal habeas corpus jurisdiction. We believe that this case differs from *Braden* in a very significant respect: the petitioner there sought to compel a trial in state court, not to avoid one. The *Braden* court stressed the significance of this circumstance:

> "[P]etitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court, not in an effort to forestall a state prosecution, but to

enforce the Commonwealth's obligation to provide him with a state court forum.

* * *

"We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court."

410 U.S. at 491, 493.

In light of the fact that Neville does seek to derail a pending state criminal proceeding, and that he may be acquitted at trial,[5] we believe the district court was correct (6) in

[5] Neville urges upon the court an analogy between his situation and one involving a claim of double jeopardy. If fully stated, his argument would proceed as follows: (1) he has a right under the Interstate Agreement not to stand trial in Illinois state court; (2) to vindicate that right, there must be a federal pre-trial forum available to test the merits of his claim; (3) if not provided with a pre-trial forum, he will be forced to undergo a trial in order to prove that he has a right not to stand trial. To support his position, Neville relies on *Abney v. United States*, 431 U.S. 651 (1977), in which the Supreme Court held that the pre-trial rejection of a defendant's double jeopardy claim was collateral to and separate from the issue of guilt, and therefore was immediately appealable. The Court remarked that the Double Jeopardy Clause would be undermined significantly if appellate review of the claim were postponed until after conviction.

Neville's reliance on *Abney* is misplaced, however. As the Third Circuit recognized in *Moore v. DeYoung*, 515 F.2d 437, 446 n. 11 (1975), there are major differences between claims arising under the Double Jeopardy Clause and those arising under the Interstate Agreement on Detainers Act.

"One major substantive difference in the nature of the two claims . . . is readily apparent. A double jeopardy claimant has once endured the rigors of a criminal trial. [The petitioner], by contrast, has not yet stood trial on any of the indictments arising out of the alleged criminal assault. Thus, the constitutional and policy considerations, which may entitle a defendant claimiing *double jeopardy* to have that claim considered in a pre-trial federal habeas petition before state court exhaustion of that issue on the merits do not apply with equal

(Footnote continued on following page)

denying the p tition for a writ of habeas corpus at this time. We note that this decision does not bar federal consideration of Neville's claim. Rather, it merely delays such consideration until "a time when federal jurisdiction will not seriously disrupt state judicial processes." *United States ex rel. Parish v. Elrod, supra* at 329.

Accordingly, we will affirm the judgment of the district court.

(7)

CUDAHY, *Circuit Judge*, dissenting. I agree that federal courts should be "reluctant" to grant pre-trial habeas relief. That reluctance should not reach the point, however, where any claim to such relief is effectively extinguished.[1] The latter result flows ineluctably from the majority's analysis in this case.

The majority finds that the Illinois Supreme Court has ruled on the merits of the petitioner's case and "without doubt" that court's ruling is "the law of the case". Petitioner "cannot realistically anticipate a different result

[5] *continued*

force to [the petitioner's Interstate Agreement on Detainers Act] contention."

The Fifth Circuit reached a similar result in *Tooten* v. *Shevin*, 493 F.2d 173 (1974), *cert. denied*, 421 U.S. 966 (1975). There the appellant contended she was entitled to pre-trial federal habeas corpus relief in order to protect her right to be free from unlawful prosecution and the unwarranted rigors of a criminal trial. The court denied her petition, distinguishing between appellant, who "merely assert[ed] a federal defense to a state prosecution," and one who asserted a double jeopardy claim. *Id.* at 176.

[1] A federal district court has jurisdcition to entertain a writ of habeas corpus sought by any prisoner "in custody in violation of the Constitution or laws or treaties of the United States" even if the prisoner has not yet been tried. 28 U.S.C. § 2241(c)(3). "Exhaustion of state remedies is not a jurisdictional requirement, and does not go to the power of the district court to hear petitions for writ of habeas corpus." *Echevarria v. Bell*, 579 F.2d 1022, 1025 (7th Cir. 1978). A prisoner held pursuant to a judgment of a state court may seek federal habeas corpus under 28 U.S.C. § 2254.

on [the issue raised in his habeas petition either] at trial or on direct appeal." If petitioner is tried by the Illinois courts, therefore, the outcome with respect to the issue raised in this petition is a foregone conclusion. And, as the majority concedes, the only event which could relieve the federal courts of the duty of eventually considering his claim would be his acquittal at his state trial. If standing trial in state court to determine innocence or guilt is an indispensable element of exhaustion of state remedies, almost by definition the prospect of *pre-trial* habeas has been entirely foreclosed. I do not read the controlling cases as requiring such an extreme result. *Braden v 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1972); *Ex parte Royall*, 117 U.S. 241 (1886); *United States ex rel. Parish v. Elrod*, 589 F.2d 327 (7th Cir. 1979).

This case is unique and likely to remain so. No other case involving pre-trial habeas has been cited where the highest court of a state has previously considered *precisely the same issue* as applied to the *very same party* as is involved in the federal habeas corpus petition and where that court has by a *full opinion* definitively (8) and authoritatively resolved the issue.[2] *Cf. United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921. The state of Illinois has had an opportunity not only to address the very issue raised by the instant petition but to render full and final judgment on that issue. The majority apparently

[2] In *Neville v. Friedman*, 67 Ill. 2d 488, 367 N.E. 2d 1341 (1977), *cert. denied*, 437 U.S. 903 (1978), the Illinois Supreme Court, in a full opinion addressed to the merits of petitioner's defense, refused to issue a writ of prohibition on his behalf. *Neville* was not a summary denial of the application for the writ as in *Tooten v. Shevin*, 493 F.2d 173 (5th Cir. 1974), *cert. denied*, 421 U.S. 966 (1975). Further, *Neville* addressed precisely the instant petitioner and facts, unlike the situation in *Echevarria v. Bell*, 579 F.2d 1022 (7th Cir. 1978). The Illinois Supreme Court in *People v. Dye*, 69 Ill. 2d 298, 371 N.E. 2d 630 (1977), followed and relied upon *Neville*.

concedes that Illinois' disposition of the issue would be clear and binding in any further state criminal proceedings. Therefore, to require, for purposes of "exhaustion," that the criminal trial take place to determine whether a finding of innocence may yet relieve the federal courts of any duty to consider the federal claim is to allow the exhaustion doctrine to swallow up whole any claim for pre-trial habeas corpus.

Under "ordinary circumstances," obviously, state remedies for addressing a prisoner's claims, other than that of innocence, cannot be said to have been exhausted before trial. *See United States ex rel. Parish v. Elrod, supra; Moore v. DeYoung*, 515 F.2d 437 (3rd Cir. 1975). But under the "special circumstances" of this case, petitioner's claims, other than his ultimate claim of innocence, have been definitively adjudicated by the highest state court. Comity would not be realistically furthered by requiring trial on the merits when the federal claims which may avoid conviction have already been subjected to the fullest scrutiny and most definitive disposition of the Illinois courts. Comity consists in giving Illinois a maximum opportunity to deal with petitioner's claims before federal intervention. The majority evidently concedes that that opportunity has already been afforded to the very fullest degree. Considerations (9) of comity are unlikely to be different whether petitioner stands merely under indictment or under conviction. In addition, Illinois has already established in this case, by hearing and deciding the application for writ of prohibition with a regular opinion on the merits, the pattern of full appellate court consideration of the Detainers Act[3] question *before* trial. Hence, the federal courts in following a similar pattern would merely be taking their lead from the state courts and furthering judicial economy.

[3] Interstate Agreement on Detainers Act, Ill. Rev. Stat. ch. 38, § 1003-8-9. The same provisions as adopted by the United States appear as 18 U.S.C. Appendix, Sec. 1-8.

In *Braden, supra,* the Supreme Court sought carefully to relate the exhaustion doctrine to its underlying purposes. Thus the Court said:

> "The exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interest of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.' *Secretary of State for Home Affairs v. O'Brien,* [1923] A.C. 603, 609 (H.L.). *It cannot be used as a blunderbuss to shatter the attempt at litigation of constituional claims without regard to the purposes that underlie the doctrine and that called it into existence.* As applied in our earlier decisions, the doctrine
>
> > 'preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, [the doctrine] preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct (10) errors of state and federal law and most effectively supervise and impose uniformity on trial courts.' Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970)."

410 U.S. 484, 490-491 (1972). [Emphasis supplied]

It is significant that in the Note thus quoted with approval by the Supreme Court in *Braden* the author

explains the factor of "orderly administration of state judicial business, preventing the interruption of state adjudication" in terms of petitioners' access to state appellate courts (which can effectively supervise trial courts). Here such access has been extraordinarily direct and complete.

In addition, since the Illinois Supreme Court has interpreted the pertinent section of the Detainers Act as applied to this petitioner in a full opinion (*Neville v. Friedman, supra)* and has relied on the *Neville* interpretation in the later case of *People v. Dye,* 69 Ill. 2d 298, 371 N.E. 2d 630 (1977), a federal district court may interpret the statute at this point without removing federal questions from the state courts or isolating such courts from federal issues—the concerns expressed in *Braden.* It would be extraordinarily useful in the instant case for a federal court to promptly consider and construe this interstate detainer compact because this compact attempts to provide a *nationally uniform* method of transferring federal prisoners to state courts. Such an objective can be realized only by uniform interpretation of the compact.[4] Obviously, effective uniformity of interpretation (11) will result more expeditiously from recourse to the federal courts now rather than after trial.

I do not disagree with the majority that *Braden* looks with disfavor on the "derailment of a pending state

[4] In *United States v. Ricketson,* 498 F.2d 367, 373 (7th Cir. 1973) this Court said with respect to the Detainers Act: "Article IV(c) permits continuances beyond the 120-day limit for good cause shown. . . . But there are no exceptions to the requirement that defendant not be returned to state custody untried." Although the transfers at issue in *Ricketson* were held not to have been governed by the Detainers Act, the language of the case apparently lends support to Neville's contention that a federal court would interpret this provision of the Detainers Act differently than the Illinois Supreme Court and demonstrates the need for an interpretation of the Act by a federal court in the interest of uniformity.

proceeding by an attempt to litigate constitutional defenses *prematurely* in federal court."[5] [Emphasis supplied] 410 U.S. 493. I do strongly suggest that under the instant "special circumstances," consideration of federal statutory claims in federal court is not premature.

Further, it is unreasonable, absent any valid question of exhaustion as to his rights under the Interstate Agreement on Detainers Act,[6] to require petitioner to endure the rigors of trial *now* merely in the hope that a verdict of innocence will relieve the federal courts of their duty to consider whether Illinois has jurisdiction to conduct the trial.[7]

I agree with the majority that the double jeopardy cases are not controlling here. *Cf. Abney v. United States*, 431 U.S. 651 (1977); *Moore v. DeYoung*, 515 F.2d 437 (3rd Cir. 1975); *Tooten v. Shevin*, 493 F.2d 173 (5th Cir. 1974), *cert. denied*, 421 U.S. 966 (1975). Petitioner is not facing the rigors of a second trial for the same offense. But I see no reason from the point of view of (12) either the state or the petitioner of requiring *any* trial until the fully mature federal claims, which go to the heart of state jurisdiction, are resolved. I would reverse and remand to the district court to hear this petition on the merits.

A true Copy:

Teste: _____

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] But I do not read *Braden* as limiting all pre-trial federal habeas to situations where a petitioner seeks to compel rather than to avoid trial. That distinction seems apt only in a right-to-speedy-trial context (which in fact characterized *Braden*).

[6] 18 U.S.C. Appendix, Sec. 1-8.

[7] It is fairly arguable at least that the facially categorical requirements of Article IV(e) of the Detainers Act are "jurisdictional". (Cf. Dissenting opinion of Mr. Justice Rehnquist in *Braden*, 410 U.S. 484, 508.) Thus Article IV(e) of the Act provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." 18 U.S.C. Appendix, Sec. 2.

APPENDIX 'B'

OPINION OF THE DISTRICT COURT

(December 5, 1978)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

CLARENCE NEVILLE,
Petitioner,

v. 78-3127

C. JOSEPH CAVANAGH, State's Attorney, Sangamon County, Springfield, Illinois, and GEORGE A. RALSTON, Warden, United States Penitentiary, Terre Haute, Indiana,
Respondents,

ORDER

Petitioner, Clarence E. Neville, has applied for a writ of habeas corpus under 28 U.S.C. §§2241 and 2254(b). Neville is currently serving a federal sentence in the U.S. Penitentiary at Terre Haute, Indiana. He was also incarcerated there in June, 1976, at which time he was transferred to Sangamon County (Springfield, Illinois) jail pursuant to the Illinois enactment of the Interstate Agreement on Detainer Act, Ill. Rev.State. ch. 38, ¶ 1003-8-9 (Interstate Agreement), for the purpose of trial on several indictments pending against him. Trial was scheduled for October 25, 1976, but Neville's privately retained counsel requested, on October 18, a continuance because of counsel's illness. The State Circuit Court continued the case until January, 1977, with a specific date to be set later. The judge also entered an order directing Neville's return to federal custody in Terre Haute, which

(2) that jurisdiction without exhaustion should not be exercised at the pretrial stage unless extraordinary circumstances are present. (Citations omitted.)

(3) where there are no extraordinary circumstances and where petitioner seeks to litigate the merits of a constitutional defense to a state criminal charge, the district court should exercise its "pre-trial" habeas jurisdiction only if petitioner makes a special showing of the need for such adjudication and has exhausted state remedies. *Braden, supra.*

In *Echevarria v. Bell,* 579 F.2d 1022 (7th Cir. 1978), the Court of Appeals for the Seventh Circuit spoke directly to several issues presently before this Court. Petitioner filed a post-state court conviction habeas corpus alleging a violation of the Interstate Agreement on Detainers Act. The Court of Appeals, upon review of the District Courts dismissal for failure to exhaust his state remedies, affirmed. It was held that "an allegation of a state prisoner that he has been denied rights under the Act, is an allegation that he is in custody in violation of a law of the United States, and the requirement for federal habeas corpus jurisdiction under 28 U.S.C. § 2254(a) is met." *Id* at p. 1025. However, the Seventh Circuit affirmed on the exhaustion question. The test used was whether the district court can determine unequivocally that an issue has been considered and ruled upon by the state courts. If it cannot, comity (not lack of jurisdiction) requires that the initial determination of the issue be made by the state courts. *Id* at p. 1025.

Echevarria had contended that the decisions in *Neville v. Friedman,* 67 Ill.2d 488 (1977), and in *People v. Dye,* 69 Ill.2d 298 (1977), wherein the Illinois Supreme Court denied relief where the record dislcosed a continuance granted at defendant's request, indicates that the state's highest court has decided the matter and would not now take a different position. The Seventh Circuit held *Echevarria* was sufficiently distinguishable on its facts from *Neville* and *Dye* so that it cannot be determined unequivocably that the present issue was determined by the state court. The Court went on to hold the three federal decisions relied on by petitioner, *U.S. v. Mauro,* 544 F.2d 588 (2nd Cir. 1976), rev'd U.S. , 98 S.Ct. 1834 (1978); *U.S. v. Ricketson,* 498 F.2d 367 (7th Cir. 1974); and *U.S. v. Sorrell,* 413 F.Supp. 138 (E.D.Pa. 1976), were not so controlling of the situations involved in *Neville* and *Dye* as to establish that Illinois has disregarded federal law.

After considering the facts as set forth in the present record and the law as set forth in the cases analyzed above, I have concluded that petitioner's habeas corpus petition is premature at this time. This case is different from *Braden, supra,* in that the petitioner here is attempting to terminate, rather than expedite, pending state proceedings. There are no special circumstances which would compel aborting a state proceeding by litigating a defense to an indictment prior to trial. It has been held that the cost, anxiety, and inconvenience of having to defend against a pending state prosecution is not irreparable harm absent factors not present in this case. *Younger v. Harris,* 401 U.S. 37 (1971) and its progeny thus preclude injunctive relief where, as here, the writ of habeas corpus does not issue.

While there is a good argument that the *Echevarria* exhaustion test was met here because the Illinois Supreme Court allowed leave to file for the extraordinary writ of prohibition and denied it via a full opinion, there still is available to petitioner the state trial, appeals if necessary, and then habeas relief in the federal courts. At that time all the petitioner's attacks on the state court proceeding would be before the Court.

It is hereby ordered that Neville's petition for a writ of habeas corpus is denied as premature and that the request for injunctive relief is also denied.

Enter this 5th day of December, 1978.

(s) J. WALDO ACKERMAN
United States District Judge